Supreme Court, U.S.
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In the

Supreme Court of the United States

GAYLA MONTGOMERY, KRONNA BYRD, JOANNE PARKER and KACCI MICHAELS,

Petitioners,

v.

CLAYTON HOMES, INC. and CMH PARKS, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does overly aggressive interrogations that affects job performance, harassment, encouragement of petitioners to fire their attorney and drop their EEOC claim, recognition that there are pay discrepancies but not doing anything about it unless Petitioners fire their attorney and drop their EEOC claim, and segregation of the women who filed their charge into their own region amount to retaliation under Title VII even though it may not involve an "ultimate employment action"?

2. Alternatively, does acknowledging that there are inequalities in pay and then insisting that the Petitioners drop their EEOC claim and fire their attorney before the problem is corrected a failure to give a raise, which is "an ultimate employment action" under TitleVII's anti-retaliation provisions?

3. In an Equal Pay Act case by a woman, does presenting evidence of a male comparator who performed the same job at the same property and made more money create a fact issue for summary judgment purposes that the male comparator performed a job requiring equal skill, effort and responsibility?

4. Is it enough for summary judgment purposes in an Equal Pay Act claim for the Defendant to meet its burden by merely pointing out that there are differences in experience and background or must the Defendant present evidence that these differences and not the sex of the comparators are the reasons for a difference in pay?

5. Did Petitioners create a fact issue of pretext by showing that (i) the individual that determined pay treated women differently, (ii) other women in the same

individual's region were paid less than male's doing the same job and (iii) males in the same region were hired at a higher level and promoted quicker then women?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioners: Gayla Montgomery ("Montgomery"), an individual

Kronna Byrd ("Byrd"), an individual

Joanne Parker ("Parker"), an individual

Kacci Michaels ("Michaels"), an individual

Respondents: Clayton Homes, Inc.("Clayton Homes")

CMH Parks, Inc. ("CMH")

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IN THE
SUPREME COURT OF THE UNITED STATES

GAYLA MONTGOMERY, KRONNA BYRD, JOANNE PARKER and KACCI MICHAELS,
Petitioners,

v.

CLAYTON HOMES, INC. and CMH PARKS, INC.,
Respondents,

Petition For A Writ Of Certiorari To
The United States Court of Appeals
For the Fifth Circuit

GAYLA MONTGOMERY, KRONNA BYRD, JOANNE PARKER and KACCI MICHAELS, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioners sued under the Equal Pay Act, and Title VII of the Civil Rights Act of 1972. Respondents filed a Motion for Summary Judgment. The trial court granted summary judgment against Petitioners by Memorandum Opinion and Order (Appendix pp 8a-32a), which became final by judgment dated June 11, 2002. Montgomery, Byrd, Parker and Michaels appealed. On March 25, 2003, the Court of Appeals for the Fifth Circuit affirmed (Appendix pp. 1a-7a). Petitioners did not request a rehearing.

JURISDICTION

Jurisdiction of this court is invoked under 28.U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

Equal Pay Act, 29 U.S.C. §206(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Title VII, 42 U.S.C. §2000 e-3(a) It shall be an unlawful employment practice for an employer to discriminate

against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

EEOC Compliance Manual, Section 8 - II, D.3.
EEOC Directives Transmittal Number 915.003 (May 20, 1998)

3. Adverse Actions Need Not Qualify as "Ultimate Employment Actions" or Materially Affect the Terms or Conditions of Employment to Constitute Retaliation.

Some courts have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment actions/36. Others have construed the provisions more broadly, but have required that the action materially affect the terms, conditions, or privileges of employment.\37

The Commission disagrees with those decisions and concludes that such

constructions are unduly restrictive. The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Of course, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. More significant retaliatory treatment, however, can be challenged regardless of the level of harm. As the Ninth Circuit has stated, the degree of harm suffered by the individual "goes to the issue of damages, not liability."\38

Example 1 - CP filed a charge alleging that he was racially harassed by his supervisor and co-workers. After learning about the charge, CP's manager asked two employees to keep CP under surveillance and report back about his activities. The surveillance constitutes an "adverse action" that is likely to deter protected activity, and is unlawful if it was conducted because of CP's protected activity.

Example 2 - CP filed a charge alleging that she was denied a promotion because of her gender. One week later, her supervisor invited a few employees out to lunch. CP believed that the reason he excluded her was because of her EEOC charge. Even if the supervisor chose not

to invite CP because of her charge, this would not constitute unlawful retaliation because it is not reasonably likely to deter protected activity.

Example 3 - Same as Example 2, except that CP's supervisor invites all employees in CP's unit to regular weekly lunches. The supervisor excluded CP from these lunches after she filed the sex discrimination charge. If CP was excluded because of her charge, this would constitute unlawful retaliation since it could reasonably deter CP or others from engaging in protected activity.

The Commission's position is based on statutory language and policy considerations. The anti-retaliation provisions are exceptionally broad. They make it unlawful "to discriminate" against an individual because of his or her protected activity. This is in contrast to the general anti-discrimination provisions which make it unlawful to discriminate with respect to an individual's "terms, conditions, or privilege of employment." The retaliation provisions set no qualifiers on the term "to discriminate," and therefore prohibit any discrimination that is reasonably likely to deter protected activity\39. They do not restrict the actions that can be challenged to those that affect the terms and conditions of

employment\40. Thus, a violation will be found if an employer retaliates against a worker for engaging in protected activity through threats\41, harassment in or out of the workplace, or any other adverse treatment that is reasonably likely to deter protected activity by that individual or other employees.\42

This broad view of coverage accords with the primary purpose of the anti-retaliation provisions, which is to "[m]aintain[] unfettered access to statutory remedial mechanisms."\43 Regardless of the degree of quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge\44. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions.

38. *Hashimoto*, 118 F.3d at 676. See also *EEOC v. L.B. Foster*, 123 F. 3d at 754 n.4 (plaintiff need not prove that retaliatory denial of job reference caused prospective employer to reject her; such a showing is relevant only to damages, not liability); *Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981) ("the questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of

discrimination – whether based on race or some other factor such as a motive of reprisal – is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of [damages]").

39. See, e.g., *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("[t]here is nothing in the law of retaliation that restricts the type of her rights by filing a complaint"); *Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991) (Section 704(a) broadly prohibits an employer from discriminating against its employees in any way or engaging in protected activity and does not "limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion.").

40. Even if there were a requirement that the challenged action affect the terms or conditions of employment, retaliatory acts that create a hostile work environment would meet that standard since, as the Supreme Court has made clear, the terms and condition of employment include the intangible work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-67 (1986). For examples of cases of recognizing that retaliatory harassment is unlawful, see *DeAnglis v. El Paso Municiapl Police Officers Ass'n.*, 51 F.3d 591 (5th Cir.), cert. denied, 116 S. Ct. 473 (1995); *Davis v. Tri-State Mack Distributor*, 981 F.2d 340 (8th Cir. 1992).

41. See *McKnight v. General Motors Corp.*, 908 F.2d 104, 111 (7th Cir. 1990) ("[r]etaliation or a threat of retaliation is a common method of deterrence"), cert. denied, 499 U.S. 919 (1991); *Garcia v. Lawn*, 805 F.2d 1400, 1401-02 (9th Cir. 1986) (threatened transfer to undesirable location); *Atkinson v. Oliver T. Carr Co.*, 40 FEP Cases (BNA) 1041, 1043-44 (D.D.C. 1986) (threat to press criminal complaint).

42. For example of cases finding unlawful retaliation based on adverse actions that did not affect the terms of conditions of employment, see *Hashimoto*, 118 F.3d at 675-76 (retaliatory job reference violated Title VII even though it did not cause failure to hire); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (instigating criminal theft and forgery charges against former employee who filed EEOC charge found retaliatory); *Passer*, 935 F.2d at 331 (canceling symposium in honor of retired employee who filed ADEA charge found retaliatory).

43. *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 848 (1997).

44. *Garcia*, 805 F.2d at 1405.

STATEMENT OF THE CASE

A. Introduction and Summary

This case raises important questions regarding Title VII retaliation and what is needed to defeat

summary judgment in an Equal Pay Act claim.

A majority of the federal circuits and the EEOC disagree with the Fifth Circuit that retaliation requires an "ultimate employment action." This is an important question here because the retaliation was severe, repeated and affected how Petitioners did their job.

The other questions deal with summary judgment in an Equal Pay Act. It is important here because Petitioner's were stripped of being able to submit their case to a jury even though they presented evidence of men doing the same job being paid more and showed that the offending supervisor treated women less favorably in other respects. Reasonable inferences from the body of evidence here should be reached by the jury rather than the Court.

B. Petitioners Made Less Money Than Male Counterparts Performing The Same Job

David Whitworth managed all four Petitioners. He set Montgomery, Byrd and Parker's pay. Whitworth enjoyed virtually complete discretion in making pay decisions. According to Whitworth and his supervisor, Allen Morgan, there were no company guidelines, policies or formulas that set the base pay for sales people or managers. Likewise, there were no standards for who received paid bonuses and compensation for making leases, and to what level these would amount.

In April of 1996, Gayla Montgomery started with Clayton Homes. At that time, she was paid no base salary. She was hired at Clayton Homes' Arlington, Texas property. Another salesman at that same property, Bob Cruey, was paid $300 a week base salary

($7.50 per hour). In March of 1998, John Benge was brought in as manager of the Arlington property. He received a base salary of $461.92/week plus a $300 rent concession. In addition, John Benge had the opportunity for a $1,500 quarterly bonus and was paid $100 for each rent/lease deal he closed. In February of 1999, John Benge left the Arlington property. David Whitworth promoted Gayla Montgomery to manager and paid her a salary of $400 a week (base pay). Gayla was not given the opportunity for a quarterly bonus and was only paid $50 for each lease deal she closed.

JoAnne Parker was hired in December of 1997 as a salesperson. She received no base pay. David Whitworth hired the following salesmen and paid them a base salary: Robert Cruey; John Yovanovich; Larry Davidson; James Michael Bloom; Don White. David Whitworth testified that responsibilities for salespeople that he hired in his region did not change from property to property.

Kronna Byrd was hired as a salesperson for Clayton Estates of Arlington in November 1997. She started off with no base pay and no draw. Again, Bob Cruey was paid $300 a week base pay for the same position at the same property.

Kacci Michaels managed Springfield Meadows. She received a base salary of $545.08/week. David Cahill replaced her as manager at the same property. He was paid a base salary of $692.32 a week.

C. Any Explanations By Respondent As To The Difference in Pay Were Pretextual

David Whitworth was rude to women. He

belittled them. He yelled at them. He intimidated them and singled them out. He made fun of overweight women and was overbearing. He was not responsive to women and did not provide them with support. When David Whitworth agreed to hire Gayla Montgomery, he would not let her perform normal sales tasks. He said she could not take any phone calls and would not be allowed to visit with any walkups. He said Gayla would have to prospect. This meant she would have to go to parking lots, apartments, and duplexes and try to sell Clayton Homes. David Whitworth testified that he never has before or since put these restrictions on any other salesperson.

David Whitworth paid men and women differently throughout his region. Cindy Cowell (a Plaintiff that settled) was paid less than two men who managed the same property as she did: Brent Jones and Randy Gentry. Other male managers in his region made a higher base salary than women at the same property. Laura Bishop made less base pay than Brent Jones managing the same property. Deborah Ruff followed Roscoe Korngut as manager at Oakwood Cove. She was paid less base pay per week then Korngut. Moreover, Korngut also was given the opportunity for a bonus while Ruff was not. Whitworth even treated husbands and wives differently. Clarence Giles made a base salary higher than his wife, Sharren Giles, who co-managed the same property. Judy and Gary Pomrenke were hired in 1994 to manage property. Judy had a base salary of $10,000 while Gary had a base salary of $30,000.

Petitioners, through Respondent's own personnel records, showed that in Whitworth's region men were hired at a more advanced level and were promoted

much more quickly than women. Of those Whitworth hired, it took men on average 4.6 months to make community manager. Fifty percent of all men were hired by Whitworth as Community Managers. Conversely, women took an average of 22.9 months to make Community Manager, and only 16.6% were hired as Community Managers. Women hired as sales people were promoted to a higher position (manager or manager trainee) on average in 26.2 months. Men hired on as sales people took an average of 8.75 months to make it to a higher position.

D. Clayton Homes Retaliated Against Mongtomery, Byrd and Parker for filing EEOC Charges

On November 6, 2000, discrimination claims were filed by Gayla Montgomery, Kronna Byrd, JoAnne Parker and Cindy Cowell. On November 8, 2000, Jim Clayton, and Allen Morgan, with Clayton Homes, discovered that the discrimination charges were filed. They were at a manager's meeting that Gayla was also attending in Waco, Texas. Gayla was separated from the rest of the group at the meeting, taken to a model home, harassed and made to cry. Allen Morgan and Jim Clayton (founder of Clayton Homes) were in this meeting with Gayla alone. Clayton was verbally abusive. He demanded to know who was behind the claims. Gayla was kept in the model for more than two hours. She was not allowed to leave because Morgan and Clayton were telling her to drop her claims.

On or around November 21, 2000, a six person Clayton Homes team arrived to investigate the allegations. At this time, it was acknowledged that there was some pay discrepancies in David Whitworth's

region. During that week of investigation, the properties at which the Petitioners worked were put in their own separate region.

While the EEOC charge was pending, Petitioners were repeatedly encouraged to get rid of their attorney and drop their EEOC claim to resolve this matter. In fact, they were told nothing could be done to correct any problems until "third-parties" were removed.

Gib Catron met with Gayla Montgomery, Cindy Cowell and JoAnne Parker on January 9, 2001. He stated that Clayton wanted to meet to try to resolve the claims. However, he explained that Clayton would not meet with the attorney or with the EEOC. During this meeting, Gayla Montgomery told Catron that Kacci Michaels was involved because she was a friend of Cindy Cowell's. Cindy Cowell was fired one day later on January 10, 2001.

From January 27 to February 1, 2001. JoAnne Parker went on a company cruise that she had won for sales achievements. Jim Clayton singled her out in a public speech. He said no one had ever successfully sued the company. He did not name Ms. Parker, but those on the cruise indicated to Ms. Parker that they knew he was referring to her.

Admittedly, Respondents had the right to investigate Petitioners' claims. However, Respondents over-investigation amounted to harassment. After the first week of investigation (with six investigators), Gib Catron and Jimmy Clayton continued to repeatedly ask about the charges. This in fact, kept Plaintiffs from their jobs. Montgomery, Parker and Byrd all took leave in part because of stress. The harassment negatively

impacted the way Petitioners were able to perform their job.

REASONS FOR GRANTING WRIT

I.

RETALIATION HERE WAS SEVERE AND SHOULD NOT REQUIRE AN ULTIMATE EMPLOYMENT ACT

A. An "Ultimate Business Decision" should not be required

As described above, the retaliation suffered by Petitioners was extreme, extended and affected the way Petitioners did their job. Retaliation should be found even if it did not involve an ultimate employment decision. A majority of the federal circuits that have considered the question upheld the protection afforded by the Anti-Retaliation provision extends to adverse employment actions that, while, substantial, fall short of employment decisions. See *Von Gunten v. Maryland*, 243 F. 3d 858, 865 (4th Cir. 2001); *Wideman v. Wal-Mart Stores, Inc.*, 141 F. 3d 1453, 1456 (11th Cir. 1998); *Knox v. State of Indiana*, 93 F. 3d 1327, 1334 (7th Cir. 1996); *Berry v. Stevenson_Chevrolet*, 74 F. 3d 980, 984-86 (10th Cir. 1996); *Wyatt v. City of Boston*, 35 F. 3d 13, 15-16 (1st Cir. 1994); *Yartzoff v. Thomas*, 809 F. 2d 1371, 1375 (9th Cor. 1987). The only other circuit that purports to follow the "ultimate employment decision" rule, the Eighth Circuit, in practice applies something broader. *See e.g., Manning v. Metro. Life Ins. Co.*, 127 F. 3d 686, 692 (8th Cir. 1997) (defining ultimate employment decision to include a "tangible change in duties or working conditions that constituted a material

employment disadvantage").

The Equal Employment Opportunity Commission ("EEOC") in it's Compliance Manual (the relevant provision is set forth above at pp 3-8) disagrees that retaliation requires ultimate employment actions. The EEOC's position is that an action is retaliatory if it is likely to deter protected activity.

The retaliation described above not only deterred protected activity but affected the way the Petitioners were able to perform their jobs. The intensive interrogation and harassment is enough to constitute retaliation. *See, Paxton v. Union National Bank*, 688 F. 2d 552, 572 (8th Cir. 1982). Firing one of the claimants, insisting that the charges be dropped and the Petitioners' attorney be fired and separating the claimants from other employees are all actions that should also not be tolerated.

B. Here, There Was An Ultimate Employment Action

Alternatively, if an "ultimate employment action" must be shown, Petitioners have shown one. The Fifth Circuit has stated:

> [w]e hold that in light of our reasoning in *Mattern* the language of Title VII, and our post-*Mattern* jurisprudence, the denial of a pay increase can be an "ultimate employment decision" actionable under Title VII's anti-retaliation provision.

Fierros v. Texas Dept. of Health, 274 F. 3d 187, 194, (5th Cir. 2001). The *Fierros* Court concluded that denial of a

$57.00-per-month pay increase was an "adverse employment action" of the type necessary to pursue a Title VII claim for retaliation.

In affirming here, the Fifth Circuit distinguished *Fierros* by finding that a pay increase was allocated before the EEOC charge was filed. Here, Respondents acknowledged that there were some pay discrepancies in David Whitworth's region. However, at the initial meeting and repeatedly throughout Clayton Homes' over-investigation of these claims, Respondents stated that nothing would be done until Petitioners dropped their EEOC charges and fired their attorney. In essence, saying that we will give you a raise when you drop your claim and fire your attorney is direct evidence of retaliation because it "requires no additional inference to conclude that [the plaintiff was discriminated against]." Id at 191. The Fifth Circuit in *Ferros* concluded that Plaintiffs affidavit, which stated that the Employer told her she would not receive a pay increase until she dropped the EEOC claim, was sufficient to present a genuine issue of material fact regarding whether retaliatory animus motivated the employment action. Id. Here the deposition testimony adduced that there were pay discrepancies but that nothing would be done about it unless Petitioners abandoned her claims presents a fact issue regarding retaliation.

II.

THE EQUAL PAY ACT CLAIMS SHOULD NOT HAVE BEEN TAKEN AWAY FROM THE JURY BECAUSE UNEQUAL PAY WAS SHOWN

A. Showing Men Made More Doing The Same Job Was Enough

This is a summary judgment case. As this Court has recently advised "reasonable inferences" are for the jury. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150 - 52 (2000). The Fifth Circuit found that Petitioners failed in their burden under the EPA because they failed to show that the jobs required equal skill, work and responsibility and that demonstrating that their positions were identical to the men in question was not enough (Appendix p. 4a). Montgomery compared herself to John Benge, who managed the same property. Michaels compared herself to David Cahill, who managed the same property. Byrd compared herself to Bob Cruey who was also a sales person at the same property. Byrd and Parker compared themselves to salesmen in the same region. David Whitworth testified that the sales position did not change in responsibility from property to property. Other circuits have generally ruled that a plaintiff need not demonstrate that her job is identical, but must show that the two positions are substantially equal, *See, Lavin-McEleny v. Marist College*, 239 F.3d 476, 480 (2d Cir. 2001); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir. 1995). In any event, whether a job is equal is for the jury. Id. It follows that since showing less than identical is all that is needed, demonstrating that the male comparator has an identical job should defeat summary judgment. See, also *Ramsey v. State of Alabama Public*

Service Commission, 869 F. Supp. 2d 1124, 1127-28 (M.D. Ala. 2000) (plaintiff may have established EPA violation by comparing her wages to that of employee of opposite sex who either proceeded or succeeded her.)

B. Respondents Failed in Their Burden

The Court mistakenly found that Appellees met their EPA burden by offering legitimate non-discriminatory reasons for the pay differences. (Appendix p. 4a) That is the standard for Title VII, not the EPA. If a Plaintiff is able to establish a prima facie case under the EPA, the burden of persuasion shifts to the Defendant to show that the differences in pay fall under one of the four affirmative defenses, which include: (1) seniority system, (2) merit system, (3) system measuring salary by quality or quantity of production, or (4) based on any factor besides sex. *Lowrey v. Texas A&M University Systems*, 11 F. Supp. 2d 895, 906 (S.D. Tex. 1998). The first three exceptions do not apply here. To establish the fourth element, Appellees must show that sex provided no part of the basis for the wage differential. *Lenihan v. Boeing Co.*, 994 F.Supp. 776, 798 (S.D. Tex. 1998). Defendants did not even try to show this.

What is conspicuously absent from any proof offered by Respondents is testimony from David Whitworth why men were paid more. Respondents did discuss qualifications; however, they did not provide evidence tying these these explanations to the difference in pay. Moreover, there is no evidence that sex played no role. Nobody, including Whitworth, testified that these men were paid more base salary because they were more qualified. Moreover, no evidence was offered that any qualifications of men

justified more pay. Without this evidence, Respondents failed in their burden on the EPA claim, no further inquiry was needed and summary judgment should have been denied. *Lenihan*, 994 F. Supp. at 798.

Gayla Montgomery's Equal Pay Act claims also included a claim that John Benge had the opportunity for a $1500 quarterly bonus that Gayla did not have, and that he was paid $100 for lease deals he closed compared to *$50* per deal to Gayla. Respondents did not provide any explanation for this disparity.

C. Pretext Was Shown

The Fifth Circuit held that Petitioners failed to show pretext (Appendix p. 4a). It has held that;

> [I]f an employee establishes by statistics that an employer had a discriminatory practice or policy toward employees of the claimant's gender, the court may infer that the employer's justification for an action it took against the plaintiff was merely pretext and that the action was really taken on the basis of plaintiffs gender in conformance with the general practice of discrimination.

Plemer v. Parsons-Gilbane, 713 F. 2d 1127, 1137 (5th Cir. 1983), See also *Siler-Khodr v. University of Texas Health Science Center San Antonio*, 261 F. 3d 542, 546-7 (5th Cir. 2001).

Here, as stated above, Petitioners have offered statistics that men were hired at higher levels and promoted quicker than men. Additionally, it was shown

that men received bonuses and were paid more than women managing the same property, husbands were paid more than their wives doing the same job, and that David Whitworth mistreated women. A jury should be allowed to determine if this is pretext.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to resolve these important issues.

Respectively submitted,

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(Any footnotes trail the end of each document.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10791
(Summary Calendar)

GAYLA MONTGOMERY;EL AL
Plaintiffs,

GAYLA MONTGOMERY, KRONNA BYRD, KACCI MICHAELS, AND JOANNE PARKER
Plaintiffs – Appellants,

versus

CLAYTON HOLMES, INC. AND CMH PARKS, INC.
Defendants – Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(4:-01-CV-241-Y)

March 25, 2003, Filed

Before JONES, STEWART, and DENNIS, Circuit Judges.
PER CURIAM:*

Gayla Montgomery, Krorma Byrd, Kacci Michaels, and Joanne Parker (collectively, the "Plaintiffs") appeal the district court's grant of summary judgment to Clayton Homes, Inc. and CMH Parks, Inc. (collectively, "CMH Parks") dismissing their claims of retaliation under Title

VII and unequal pay under Title VII and the Equal Pay Act ("EPA"). For the following reasons, we affirm.

Factual and Procedural Background

CMH Parks owns mobile-home communities throughout Texas and other states. Each of the Plaintiffs worked at one or more of these mobile-home communities under the management of David Whitworth. The Plaintiffs sued CMH Parks claiming that they were not paid a commensurate salary with male employees in violation of Title VII and the EPA. Fn1 Montgomery, Byrd and Parker each alleged an additional claim of retaliation. Fn2 The district court granted summary judgment to CMH Parks on each of these claims.

Discussion

We review a district court's grant of summary judgment de novo. Mowbray v. Cameron County, Tex., 274 F.3d 269, 278 (5th Cir. 2001). Summary judgment is appropriate only when the record indicates "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56.

I. Unequal pay claims under Title VU and EPA

Under the EPA, an employer is prohibited from discriminating "between employees on the basis of sex by paying wages to employees in such establishment... for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). To establish a prima facie case under the EPA, a plaintiff must show that: 1) her employer is subject to the EPA; 2) she performed work in a position requiring equal skill, effort, and responsibility under

similar working conditions, and 3) she was paid less than the employee of the opposite sex providing the basis of comparison. Chance v. Rice Univ., 984 F.2d 151, 153(5th Cir. 1993). Once the plaintiff establishes a prima facie case, the burdens of production and persuasion shift to the employer to demonstrate that the disparate wage payments were made pursuant to: 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of production; or 4) a differential based upon any other factors other than sex. See 29 U.S.C. § 206(d)(1).

Title VII prohibits discrimination in compensation based on an individual's sex. See 42 U.S.C. § 2000e-2(a)(1). Generally, a Title VII wage discrimination claim parallels that of an EPA violation. See Siler-Khodr v. Univ. of Texas Health Science, 261 F.3d 542, 546 (5th Cir. 2001). Unlike an EPA claim, however, to prevail under Title VII, the plaintiff must prove discriminatory intent. Lenihan v. Boeing Co., 994 F. Supp. 776, 797 (ND. Tex. 1998). Thus, in a disparate treatment case, the plaintiff must show that she occupies a job similar to that of higher paid workers of the opposite sex. Id. at 798. An employer seeking to rebut a prima facie case of employment discrimination, need only "articulate" a legitimate non-discriminatory reason for its actions. Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1136 (5th Cir. 1983). If the employer carries its burden of production, the plaintiff must prove by a preponderance of the evidence that the employer's reasons are a mere pretext for discrimination. Id.

The district court properly rejected the Plaintiffs' attempt to apply the continuing-violation doctrine to unequal pay claims that fell outside Title VII's 300 day statute of limitation period because the Plaintiffs failed to put forth evidence of when they learned of the pay

disparity The district court correctly limited the Plaintiffs' unequal pay claims under the EPA to those brought within two years from the date the cause of action accrued, or if the Plaintiffs could prove that the violation was willful, within three years. 29 U.S.C. § 255(a). Even assuming that some of the instances of unequal pay alleged by the Plaintiffs are timely, the district court's grant of summary judgment in favor of CMH Parks was proper.

The district court further rejected the Plaintiffs' unequal pay claims under Title VII and the EPA because it found that the Plaintiffs failed to present evidence that the work they performed required equal skill, efforts and responsibility as the work performed by the men in question. Fn3 The Plaintiffs argue that the relevant comparison should focus on the jobs performed and not the people holding them. Thus, the Plaintiffs assert that they satisfied their burden because the evidence demonstrates that their positions were identical to the men in question. Fn4 We reject this argument. This Court has stated that the job content and actual job requirements, not the job title, classification or description, are determinative. See E.E.O.C. v. Hernando Bank. Inc., 724 F.2d 1188, 1196 (5th Cit 1984).

Even assuming that the Plaintiffs make out a prima facie case for a violation under EPA and Title VII, CMH Parks offered legitimate non-discriminatory reasons for the pay disparities. After reviewing the record, we are persuaded that the unequal pay was the result of differences in job responsibilities, experience, and work performance. The Plaintiffs have not put forth persuasive evidence that the reasons articulated by CMH Parks are pretexts for intentional discrimination.

II. Retaliation claim

In order to establish a prima facie case of retaliation, a plaintiff must demonstrate that 1) she engaged in activity protected by Title VII, 2) an adverse employment action occurred, and 3) a causal link existed between the protected activity and the adverse employment action. See v. Caldera. 274 F.3d 282, 286 (5th Cit. 2001). The district court held that the fact that the Plaintiffs' salaries were not increased after they filed charges with the EEOC did not constitute an adverse employment action. Relying on Fierros v. Texas Department of Health, 274 F.3d 187 (5th Cir. 2001), the Plaintiffs argue that their failure to receive a salary increase constitutes an adverse employment action. Fierros is distinguishable from the present case. In Fierros, the plaintiffs immediate supervisor initially approved a merit pay increase. Id. at 190. After the plaintiff filed a discrimination complaint against her employer, however, her merit pay increase was denied. Id.

We reject the Plaintiffs attempt to turn CMH Parks' purported failure to correct pay disparities, before a determination regarding whether the pay was in fact in violation of the law, into a claim for retaliation. To do so would transform every disputed claim for unequal pay into a claim for retaliation.

Conclusion

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment to CMH Parks.

AFFIRMED.

*Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set

forth in 5th CIR. R. 47.5.4.

Fn1 Cindy Crowell, who was a plaintiff in the underlying case, settled all of her claims against CMH Parks and is not appealing the district court' judgment. Crowell's retaliation claim is the only claim that survived summary judgment.

Fn2 Parker further alleged Title VII claims for sexual harassment and racial discrimination. Each of the Plaintiffs asserted a state-law claim for intentional infliction of emotional distress. The Plaintiffs have not appealed these claims.

Fn3 The men in question are CMH Parks' employees Bob Cruey, John Benge, Dale English, Drew Gilland, Troy Anderson, John Yovanovitch, Larry Davidson, James M. Bloom, Don White, and David Cahill. Because the Plaintiffs failed to put forth a prima facie case under Title VII and the EPA, we need not examine the specifics of each Plaintiffs claim against the men in their respective employment position.

Fn4 The plaintiffs cite to Lenihan and Price v. Danka Corp, 2000 WL 274276 (N.D. Tex. Mar. 10, 2000) for this proposition. These cases are distinguishable. In Lenihan, the plaintiff compared herself to men who occupied different job positions, whereas the Plaintiffs in this case occupy identical positions as the men in question. In Price, although the district court held that the plaintiff established that she and the men in question performed equal work based on the fact "they held the same nominal title and worked in the same or similar offices," it reached this conclusion based on the fact that the Defendant did not dispute that the positions entailed the same work and skills as required by the men in question. 2000 WL274276, at *9. CMH Parks,

however, maintains that there were substantial differences in responsibilities and duties between the different properties within and between the regions. The Plaintiffs did not put forth evidence showing that the positions entailed equal work, skills and responsibilities. Their conclusory assertions that the responsibilities were identical to those of the men in question does not change this result.

IN THE UNITED STATES DISCTICT COURT
FOR THE NORTHERN DISTRICT OF TREASURY
FORT WORTH DIVISION

ACTION NO. 4:01-CV-241-Y

GAYLA MONTGOMERY, KRONNA BYRD,
CINDY COWELL, JOANNE PARKER,
and KACCI MICHAELS

VS.

CLAYTON HOMESM INC. and
CMH PARKS, INC.

MAY 30, 2002 Filed

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending before the Court is the summary judgment motion of defendants Clayton Homes, Inc. and CMH Parks, Inc. (collectively, "CMH Parks"), filed on March 25, 2002, along with supporting briefs, appendices, responses, and replies by both parties. After careful consideration of the motion, the responses and replies thereto, the applicable law, and summary judgment evidence, the Court, for the reasons that follow, concludes that it should be granted in part and denied in part.

I. Factual Background

CMH Parks owns mobile-home communities throughout

Texas and other states. Each of the plaintiffs, Gayla Montgomery, Kronna Byrd, Cindy Cowell, Joanne Parker, and Kacci Michaels, worked at one or more of these mobile-home communities for differing periods of time. Though their job titles varied, it appears that each of the plaintiffs performed mostly managerial-type functions in overseeing the operation of the particular mobile-home community to which she was assigned.

While the facts will be discussed in more detail below, the gravamen of Plaintiffs' claims is gender-based, unequal pay by CMH Parks. In particular, Plaintiffs complain that David Whitworth, a regional manager who hired each of the plaintiffs and under whom each of the plaintiffs at one time or another worked, sexually discriminated against them by paying men more and by generally treating men better in terms of his responsiveness to their needs and suggestions. Most of Plaintiffs' purported evidence of Whitworth's discriminatory behavior relates to the specific alleged differences in pay between the plaintiffs and various male employees and to a handful of inappropriate comments purportedly made by Whitworth.

All five plaintiffs assert claims against CMH Parks for sex discrimination under Title VII and for violation of the Equal Pay Act. Four of the plaintiffs–Cowell, Montgomery, Byrd, and Parker–allege an additional Title VII claim for post-EEOC charge retaliation. Cowell bases this claim on the termination of her employment; and Montgomery, Byrd, and Parker base this claim on their purported constructive discharge. Only Parker alleges claims for sexual harassment and racial discrimination under Title VII. Finally, all plaintiffs assert a state-law claim for intentional infliction of emotional distress. CMH Parks has moved for summary judgment on all of Plaintiffs' claims, asserting that they

are either barred by the statute of limitations and/or that Plaintiffs have failed to state a prima-facie case or otherwise establish all of the requisite elements of their claims. These "assertions are analyzed below.

I. Summary Judgment Standard

Under Rule 56 (c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Melton v. Teachers Ins. & Annuity Ass'n of Am., 114 F.3d 557, 559 (5th Cir. 1997) . The court must decide all reasonable doubts and inferences in the light most favorable to the party opposing the motion. See Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994); Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988) Mere allegations of a factual dispute between the parties will, however, not defeat an otherwise proper motion for summary judgment. Rosas v. United States Small Bus. Admin., 964 F.2d 351, 355 (5th Cir. 1992). . Rather, the dispute must concern a genuine issue of material fact. See Fed. R. Civ. P. 55(c). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party; material facts are facts that might affect the outcome of the suit under governing law. Id. (citations omitted)

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323; Lynch Properties, Inc. v. Potomac Ins. Co., 140 F.3d 622, 625

(5th Cir. 1998). Where the nonmoving party bears the burden of proof on a claim upon which summary judgment is sought, the moving party may discharge its summary judgment burden by showing an absence of evidence supporting the nonmoving party's case. See Celotex, 477 U.S. at 325. Once the moving party has satisfied this burden, the non-moving party must go beyond the pleadings and, by its own affidavits or depositions, answers to interrogatories, and admissions on file, set forth specific facts showing a genuine issue for trial. See Matsushita Elec. Indus Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1985); Edwards v. Your Credit, Inc., 148 F.3d 427, 431-32 (5th Cir. 1998).

III. Analysis

A. Intentional Infliction of Emotional Distress

Each of the plaintiffs have asserted a claim against CMH Parks for intentional infliction of emotional distress In response to CMH Park's motion for summary-judgment on this claim, Plaintiffs boldly state, without any supporting case authority or explanation, that they disagree with Defendant's definition of intentional infliction of emotional distress. (Brief in Support of Plaintiffs' Response to Defendants' Motion for Summary Judgment ("Plaintiffs' Resp.") at 29.) The elements of this claim are well established, however, and have been accurately represented by CMH Parks.

Intentional infliction of emotional distress occurs when: (1) a person acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the person's actions caused another person's emotional distress; and (4) the emotional distress suffered by the other person was severe. See Bradford v. Vento, 48 S.W.3d 749, 758 (Tex. 2001); GTE Southwest, Inc. v. Bruce, 998 S.W.2d

605, 611 (Tex. 1999). Whether a defendant's conduct is "extreme and outrageous" is a question of law. Brewerton v. Dalrymple, 997 S.W.2d 212, 216 (Tex. 1999). The mere fact that a defendant's conduct is tortious or otherwise wrongful does not, standing alone, necessarily render it "extreme and outrageous." Id. Instead, to be "extreme and outrageous," conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." GTE, 998 S.W.2d at 611. Mere insults, indignities, threats, annoyances1 petty oppressions, or other trivialities do not rise to the level of extreme and outrageous conduct. Id.

In its motion for summary judgment, CMH Parks contends, inter alia, that no conduct toward any of the plaintiffs rises to the requisite extreme and outrageous level necessary to sustain this cause of action. The Court agrees. In response to CMH Park's summary judgment, Plaintiffs allege scant instances of any specific conduct. What conduct is alleged is done so in conclusory fashion with few, if any, record citations to summary-judgment evidence. Conclusory allegations are not competent summary-judgment evidence. Wayne v. The Dallas Morning News, 79 F. Supp.2d 571, 577 (N.D. Tex 1999). Further, as well stated by the Fifth Circuit, "Rule 56 does not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." Doddy v. Oxy USA, Inc., 101 F.3d 448, 463 (5th Cir. 1996) The Court has nonetheless examined what conduct Plaintiffs do allege and concludes that none of it rises to the requisite level as a matter of law.

Montgomery contends that Whitworth "made fun of" her weight, "[i]n essence, emotionally abused her," and

discriminated against her by not paying her what he paid other managers. (Plaintiffs' Resp at 29.) She also claims she was harassed by others at CMH Parks after she filed her initial charge with the Equal Employment Opportunity Commission ("EEOC") by being confronted and kept in an "isolated location" during the confrontation. Id. Cowell alleges that she was "discriminated against," Fn1 fired, and that a CMH Parks representative purportedly told her new employer that no more business would be sent because he hired Cowell. (Id. at 30.) Finally, Parker claims she was singled out for going on a cruise and that CMH Parks failed to take any action "about her sexual harassment until after she filed an EEOC charge." Id. Michaels and Byrd do not appear to allege any conduct in support of this claim.

The Court concludes that any discriminatory pay, the alleged confrontation of Montgomery over her EEOC charge, and CMH Park's firing Cowell, all fall within the realm of ordinary employment disputes and hence do not constitute intentional infliction of emotional distress. See MacArthur v. Univ. of Texas, 45 F.3d 890, 898 (5th Cir. 1995) (mere employment dispute not intentional infliction of emotional distress); Haynes v. Bluecross and Blueshield of Texas, No. 3:97-CV-2881-R, 2000 WL 140 744, at *16 (N.D. Tex. 2000) (termination of employment is insufficient to satisfy the extreme and outrageousness element of an intentional infliction claim); Nickel v. Rocky Mountain Clothing Co., No- 3-98-CV-2430-R, 2000 WL 284192, at *9 (N.D. Tex. 2000) (same) . Even illegal conduct in the employment context may not be extreme and outrageous. Fn2 Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993); Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1991).

With respect to Parker's sexual-harassment claim, she appears to claim only that CMH Parker's delay in responding to her complaint, as opposed to the harassment itself, was intentional infliction of emotional distress. (Plaintiffs' Resp. at 30.) This too, however, falls within the realm of an ordinary employment dispute and is not intentional infliction of emotional distress. See MacArthur; 45 F.3d at 898. To the extent Parker is claiming that the actual harassment was intentional infliction of emotional distress, such conduct also falls short. Parker's sexual harassment claim consists of the following alleged incidents involving Dale English, a CMH Parks manager: (1) Parker had an Essence magazine on her desk with a cover reading "What do black woman do in bed?" English asked Parker what they do; (2) English told one man visiting Parker he was about the ninth guy to see her and made other unidentified comments to or about other men visiting her; (3) when he learned Parker had gone to eat lunch with a man, English told another woman that Parker must be going out for a "noonish" and that bosses should be first; (4) English made a comment about another woman's breasts and about another woman probably looking good naked in front of the fireplace; and (5) On one occasion, English grabbed Parker's arm and pulled her to him. (Plaintiffs' Resp. at 6-7.) Fn3

While offensive and boorish, none of the conduct underlying Parker's claim for sexual harassment can be classified as extreme and outrageous. Other courts have so held when faced with similar facts. See, e.g., Cearhart v. Eye Care Centers of Am., Inc., 888 F. Supp. 814, 823. (S.D. Tex. 1995) (supervisor's comments about an article on breasts and comments about another woman's breasts, his alleged putting his arm around plaintiff and touching the right side of her breast on one occasion, his playing with her hair, and his kicking her in the

buttocks, not extreme and outrageous as a matter of law); Webster v. Bass Enter. Prod. Co., 192 F. Supp.2d 684, 697 (N.D. Tex. 2002) (supervisor allegedly throwing objects at plaintiff, sticking his tongue out in a sexually suggestive manner, asking her if she wanted to get drunk, telling her that all women were "fair game," denying her raises, and pushing her and her chair into a desk to read her computer from behind, not extreme and outrageous as a matter of law).

The only remaining, complained-of conduct pertains to alleged comments by Whitworth about Montgomery's weight and the "cruise incident" involving Parker. While, if made, any comments about Montgomery's weight were no doubt inappropriate, such comments amount only to mere insults or indignities and do not, as a matter of law, constitute intentional infliction of emotional distress. GTE, 998 S.W.2d at 611; see also Uglade, 990 F.2d at 243 (employer referring to Hispanic employee as a "Mexican" and "wetback," although condemnable, not extreme and outrageous). The Court turns to the alleged "cruise incident" involving Parker. While Parker was on a cruise, she claims that Jim Clayton of CMH Parks singled her out in a public speech by stating that no one had ever successfully sued the company. Although she was not mentioned by name, unidentified others told her "they knew he was referring to her." (Plaintiffs' Resp. at 16.) This falls so short of the extreme and outrageousness required for this claim that it does not even warrant discussion.

In short, the standard for finding extreme and outrageous conduct is rigorous, and Plaintiffs have not met it. See also Diamond Shamrock Ref. & Mktg. Co. v. Mendez, 844 S.W.2d 198, 202 (Tex. 1992) (falsely accusing employee of being a thief insufficient to constitute outrageous behavior); Wornick v. Casas, 856

S.W.2d 732, 735 (Tex. 1993) (security guard escorting employee off premises not outrageous). Summary judgment is therefore granted on each of the plaintiffs' claims for intentional infliction of emotional distress

B. Parker's Claim For Sexual Harassment

To establish a prima-facie claim for sexual harassment under Title VII, a plaintiff must establish that: (1) she belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; and (4) the harassment complained of affected a term, condition or privilege of employment, i.e. the sexual harassment must be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. Fn4 Watts v. Kroger Co., 170 F.3d 505, 509 (5th Cir. 1999) . The bar is high. Not all harassment affects the conditions of employment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) The mere utterance of an epithet that engenders offensive feelings does not sufficiently affect the conditions of employment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Similarly, simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. Faragher v. City of Boca Raton, 524 U.S. 775, 118 (1998) . In short, Title VII is not a general civility code for the workplace. Indest v. Freeman Decorating, Inc., 164 F.3d 258, 263 (5th Cir. 1999).

In its discussion on Parker's claim for intentional infliction of emotional distress, the Court identified the sexual harassment alleged by Parker and will not repeat that discussion fully here. In essence, Parker alleges a handful of inappropriate comments, several of which

were not even made directly to her, and one incident where a supervisor grabbed her arm, perhaps near her breast. (Plaintiffs' Resp. at 6-7.) The complained-of incidents are few in number, were not physically threatening, and have not been shown to undermine Parker's work performance in any way. The comments themselves, though offensive and crude, are certainly not of the extreme nature required to amount to a change in the terms of employment as required by the fourth element of a sexual harassment claim. See Shepherd v. Comptroller of Public Accounts of State of Texas, 168 F.3d 871, 874 (5th Cir. 1999) cert. denied, 528 U.S. 963 (1999) (allegations that supervisor touched plaintiff's arm, rubbed her shoulder, and made inappropriate comments about her thighs and nipples too "tepid" to constitute sexual harassment as a matter of law) . Fn5 Because the Court concludes that Parker has not made a prima facie showing on the fourth element of her sexual-harassment claim, the Court need not address the remaining elements. Summary judgment is granted on Parker's claim for sexual harassment.

C. Parker's Claim For Race Discrimination

CMH Parks has also moved for summary judgment on Parker's claim for race discrimination under Title VII. Specifically, CMH Parks asserts that Parker cannot establish a prima-facie case, which in turn, requires a showing that: (1) Parker is a member of a protected class; (2) she suffered an adverse employment action; (3) she was treated differently than similarly situated individuals; and (4) there was a causal connection between her race and the adverse employment decision. Padilla v. Carrier Air Conditioning, 67 F. Supp.2d 650 656 (E.D. Tex. 1999) . CMH Parks describes three incidents that Parker feels were racially tinged: (1) prior to being hired, a property manager asked Parker to report back

on Whitworth's expression upon meeting her because Whitworth did not know she was black; (2) Parker did not get credit for completing one sale; and (3) Whitworth asked Parker whether she could recommend any African Americans he could hire who would not sue the company. (Brief in Support of Defendants' Motion for Summary Judgment ("Defendants' Br.") at 40-41.)

Because Parker has not offered any argument, authority, evidence, or otherwise responded to CMH Parks's motion for summary judgment on her claim for race discrimination, summary judgment is proper. See Forsyth, 19 F.3d at 1537 (To defeat summary judgment, nonmovant must identify specific evidence in the record and articulate the precise manner in which that evidence supports her claim); Fincher v. City of Dallas, No. 301-CV-0128-R, 2002 WL 441395, at *5 (N.D. Tex. 2002) (In the absence of a summary judgment response, court has no duty to search for a kernel at evidence that might present a basis for denying summary judgment). Moreover, based on the record before it, which, at best, consists of one race-related comment, Fn6 the Court concludes that Parker has not established the second, third, and fourth elements of a prima-facie case for race discrimination. Specifically, Parker has not shown that she suffered an adverse employment action, that she was treated differently than others similarly situated, and the existence of a causal connection between her race and any adverse employment decision. See Padilla, 67 F. Supp.2d at 656. Summary judgment is proper on all these bases as well. Fn7

D. Claims for Retaliation Under Title VII

Four of the five plaintiffs–Montgomery, Byrd, Parker, and Cowell–allege that they were improperly retaliated against after filing charges with the EEOC. In order to

establish a prima-facie case of retaliation, a plaintiff must prove that: (1) she engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the protected activity and the adverse employment action. Aldrup v. Caldera, 274 F3d. 282, 286 (5th Cir. 2001) (citation omitted) . Assuming the plaintiff is able to establish her prima-facie case, the burden then shifts to the defendant to demonstrate a legitimate nondiscriminatory purpose for the employment action. Id. If the defendant makes the required showing, the burden returns to the plaintiff to demonstrate that the employer's articulated reason for the employment action was a pretext for the real, discriminatory reason Id. Because it is undisputed that each of these plaintiffs engaged in protected activity by filing a charge with the EEOC, the Court focuses on whether the second and third elements have been established.

1. Failure to Receive Salary Increase Is Not An Adverse Employment Action

Montgomery, Byrd, Parker, and Cowell all point to their not receiving salary increases since filing their EEOC claims as an adverse employment action. The Court disagrees. First, Plaintiffs are essentially claiming that because CMH Parks did not rectify any pay discrepancy and thereby concede that it had paid them unequally or otherwise unfairly, CMH Parks has also retaliated against them. Plaintiffs would transform every disputed claim for unequal pay into a claim for retaliation. Plaintiffs cite to no legal authority in support of this assertion, and the Court rejects it. Fn8 Further, each of the plaintiffs claiming retaliation, as discussed below, also rely on their subsequent termination or constructive discharge as an adverse employment action. These two purported employment actions

appear to be largely mutually exclusive. Fn9

2. Failure to Promote Is Not An Adverse Employment Action

Cowell and Parker also claim that the failure to promote them to manager at their respective mobile-home communities was an adverse employment action against them. As with many of the assertions in Plaintiff's Response, this allegation is, for the most part, conclusory and unsupported by any cites to summary-judgment proof. Fn 10 Regardless, because neither Cowell nor Parker point to any evidence of a causal connection between their filing charges with the EEOC and their not receiving these promotions, which is the third requisite element of a retaliation claim, they have failed to establish a prima facie case based on failure to promote. See, e.g., Wayne, 78 F. Supp.2d at 586 (summary judgment proper on plaintiff's retaliation claim because there was no evidence of a causal connection between her EEOC filing and the decision to award position to someone else)

3. Montgomery, Byrd, and Parker Were Not Constructively Discharged

Next, Montgomery, Byrd, and Parker all claim that they were constructively discharged and that their constructive discharge amounted to an adverse employment action. To prove constructive discharge, they must show that a "reasonable person in shoes would have felt compelled to resign." Woods, 274 F.3d at 301 (quoting Faruki v. Parson, S.I.P., Inc., 123 F.3d 315, 319 (5th Cir. 1997)). Moreover, to be actionable, Plaintiffs must "demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment

claim." Id. (quoting Benningfield v. City of H ouston, 157 F.3d 369, 378 (5th Cir 1998) . cert. denied, 526 U.S. 1065 (1999)). A hostile working environment, in turn, requires a showing that the harassment is sufficiently severe or pervasive enough to alter the conditions of employment and create an abusive working environment. See, e.g., Watts, 170 F.3d at 509.

The harassment urged by Montgomery, Byrd, and Parker does not satisfy this high standard. They allege only that various persons at CMH Parks asked them about their charges against the company (Montgomery alleges in one such discussion she cried) and urged them to drop their charges and their lawyers so that any problems could he handled internally. (Plaintiffs' Rep. at 15-16, 27.) Parker points again to the "cruise incident" and also to the fact that various persons called her on the phone. (Id. at 16.) While she suggests the calls were harassing, she does not describe the content of any of the calls. (Id.) A reasonable person in the shoes of Montgomery, Byrd, or Parker would not have felt compelled to resign under the circumstances alleged. See, e.g., Ugalde, 990 F.2d at 242-43. Thus, although constructive discharge can be an adverse employment action, the Court concludes, as a matter of law, that neither Montgomery, Byrd, nor Parker were constructively discharged. Fn11

4. Fact Question Exists As To Whether Cowell's Termination Was Retaliatory

Finally, Cowell alleges that her termination was retaliatory. Clearly, termination is an adverse employment action. Wayne, 78 F. Supp.2d at 585. The only question then is whether there is a causal connection between the protected activity–her filing a charge with the EEOC–and her termination. Aldrup, 274 F.3d at 286. CMH Parks claims that there were

legitimate reasons regarding Cowell's work performance, including blatant violations of company policy, to justify her termination. Cowell asserts, however, with citations to the record, that she was fired one day after CMH Parks discovered that she was the reason Michaels joined in this dispute. (Plaintiffs' Resp. at. 28.) Also, there is deposition testimony that other CMH Parks employees were not fired for arguably more serious violations of company policy than those alleged against Cowell. (Id.) For these reasons, the Court cannot hold, as a matter of law, that Cowell's claim for retaliation fails. Summary judgment is therefore denied as to Cowell's claim for retaliation.

E Sex Discrimination for Failure to Promote

Each of the plaintiffs allege that CMH Parks sexually discriminated against them by not promoting them because of their gender. Fn12 CMH Parks asserts that much of the conduct underlying this claim is time - barred and, in any event, Plaintiffs cannot establish a prima-facie case for discrimination. The Court agrees.

Any failure-to-promote claim is, f or the most part, time—barred. In Texas, a Title VII plaintiff must file a charge of discrimination with the EEOC within 300 days after learning of the Conduct alleged Huckaby v. Moore, 142 F.3d 233, 238 (5th Cir. 1998) . The limitations period begins to run on the date of the discriminatory act, and plaintiff cannot sustain her claims based on incidents occurring before the 300-day period. Snooks v. Univ. of Houston, 996 F. Supp. 686, 688 (S.D. Tex 1998) (citations omitted). Accordingly, any claim for failure to promote by any of the plaintiffs that is based on conduct occurring more than 300 days prior the filing of her EEOC charge is barred by limitations.

Plaintiff s urge, however, that the continuing—violation doctrine preventing their failure-to-promote claims from being untimely. Fn13 This doctrine is an equitable exception that applies "where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." Snooks, 996 F. Supp. at 690 (quoting Waltman v. Int'l Paper Co., 875 F.2d 468, 474 (5th Cir. 1989)). The focus is on what event, in fairness and logic, would have alerted the average lay person to act to protect her rights. Lowery v Univ. of Houston, 82 F. Supp.2d 689, 694 (S.D. Tex. 2000) (citations omitted) . It is well settled that the continuing-violation doctrine does not apply to a claim for failure to promote, because the failure to receive a promotion is the very type of event that should alert a person to assert her rights. See, e.g., Lowery, 82 F. Supp.2d at 694; Huckaby, 142 F.3d at 240; Wayne, 78 F. Supp.2d at 581-82; Stewart v. Houston Lighting & Power Co., 998 F. Supp. 746, 749 (S.D. Tex. 1998) . Thus, the continuing-violation doctrine does not apply.

Given that most of the plaintiffs filed their EEOC charges long after they left CMH Parks, most, if not all, of the conduct underlying Plaintiffs' claims for failure to promote is barred by limitations. To the extent, however, that Plaintiffs also assert timely claims for failure to promote, i.e., claims based on conduct occurring within the 300-day period, the Court concludes that summary judgment is proper as to these claims as well. To establish a prima-facie failure-to-promote claim, a plaintiff must prove that: (1) she is a member of a protected class; (2) she sought and was qualified for an available employment position; (3) she was rejected for the position; and (4) the employer continued to seek applicants with the plaintiff's qualifications. Celestine, 266 F.3d. at 354-55. Among other things, Plaintiffs have failed to identify what

specific promotions they applied for but did not receive. Moreover, there is a dearth of summary-judgment evidence on Plaintiffs' qualifications for the position(s) sought. Fn14 (Plaintiffs' Resp. at 7, 8, 9, 19.) Again, "Rule 56 does not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." Doddy, 101 F.3d at 463. Accordingly, none of the plaintiffs has established a prima-facie case for failure to promote. Summary judgment is granted on this claim with respect to each plaintiff.

F. Unequal Pay

The Court next considers Plaintiffs' remaining unequal-pay claims. Plaintiffs contend that CMH Parks violated Title VII and the Equal Pay Act by failing to pay them a commensurate salary with similarly situated male workers.

1. Pay Claims Under Title VII

The Court first addresses Plaintiffs' Title VII pay claims. As with Plaintiffs' claims for failure to promote, CMH Parks again asserts that the statute of limitations bars most, if not all, of the conduct underlying any claim for unequal pay under Title VII. If the 300-day rule applies and the continuing-violation doctrine does not, CMH Parks is correct. Very little, if any, of Plaintiffs' unequal-pay claims will survive, at least for purposes of Title VII.

Unlike failure-to-promote, the Court finds scant precedent addressing the application of the continuing-violation doctrine to claims for unequal pay. Neither party cites any case squarely on point. One court has found the doctrine applicable, but only because the plaintiff submitted summary-judgment evidence

showing that she did not know of any pay disparity until after she resigned. See Lowery, 82 F. Supp. 2d at 694; see also Berry v. Bd. of Supervisors of L.S.U. 715 F.2d 971, 980-81 (5th Cir. 1983) (citing opinions from other circuits holding that salary discrimination was a continuing violation). Given that the focus in assessing the application of this equitable doctrine is on what event, in fairness and logic, would have alerted the average lay person to act to protect her rights, see Lowery, 82 F. Supp.2d at 694, the Court finds the reasoning of this opinion to be sound. Consequently, to survive summary judgment on their claims for unequal pay under Title VII, Plaintiffs should have presented competent summary-judgment evidence as to when they each, individually, first learned of any pay disparity. They did not. Fn15 The Court's conclusion is bolstered by the fact that Plaintiffs bear the burden of showing that the continuing-violation doctrine applies. See Celestine, 266 F.3d at 353 n.2. Thus, any unequal-pay claim under Title VII by any of the plaintiffs that is based on conduct occurring more than 300 days prior the filing of her EEOC charge is barred by limitations.

From the summary-judgment evidence, none of the Plaintiffs appears to allege any instances of unequal pay occurring within the 300 days preceding the filing of their respective charges with the EEOC. Assuming f or the sake of argument, however, that some of the specific instances of unequal pay alleged by Plaintiffs are timely, Fn16 the Court concludes that summary judgment is nonetheless proper.

As with Plaintiffs' other Title VII claims, Plaintiffs' unequal-pay claims are subject to the burden-shifting framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 TLB. 792 (1913). Guadarrama v. Vance, No. 3:95-CV-0723, 1998 WL 59026,

*4 (N.D. Tex 1998), appeal dismissed, 166 F.3d 338 (5th Cir. 1998) Plaintiffs must first establish a prima-facie case of discrimination. The burden then shifts to defendant to articulate a legitimate, nondiscriminatory reason for the allegedly discriminatory action taken. Defendant's burden is one of production, not of proof. If defendants meet their production burden, plaintiffs must adduce evidence that would permit a reasonable trier of fact to find that the articulated reason is a pretext for intentional discrimination. See Guadarrama, 1998 WL 59026, at *6 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-11 (1993); Rhodes V. Guiberson Oil Tools, 75 F3d 989, 992-93 (5th Cir.1996) (en banc); Tutton v. Garland Indep. Sch Dist., 733 F. Supp. 1113, 1116 (N.D. Tex.1990)).

Although Plaintiffs list a number of male employees who were purportedly paid more, Plaintiffs have failed to present evidence that the work they performed required equal skill, effort, and responsibility as the work performed by these men. See Peters v. City of Shreveport, 818 F.2d 1148, 1154-55 (5th Cir. 1987) ; Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1136 (5th Cir. 1983) Any assertions that Plaintiffs did perform commensurate work as these male employees are largely conclusory. Plaintiffs have thus not established their prima-facie case. Moreover, even had plaintiffs established a prima-facie case, CMH Parks has articulated legitimate, nondiscriminatory reasons for any pay disparities. Specifically, CMH Parks has offered legitimate reasons for any and all pay disparities between Plaintiffs and all the male employees cited by Plaintiffs, including Bob Cruey, John Benge, John Yovanovich, Larry Davidson, James M Bloom, Don White, Randy Gentry, Brent Jones, David Cahill, Dale English, Drew Gilland, and Troy Anderson. (Defendants' Brf. at 29-30; Defendants' Reply to Plaintiffs' Rsp. at 2-9.)

The reasons include, without limitation, differences in job responsibilities, experience, and work performance. (Id.) Based on the Court's review of the summary-judgment evidence, Plaintiffs have not adduced evidence that would permit a reasonable trier of fact to find that the reasons articulated by CMH Parks are pretexts for intentional discrimination. Therefore, the Court also grants CMH Parks's motion for summary judgment as to any timely, Title VII pay claims.

2. Pay Claims Under The Equal Pay Act

CMR Parks again asserts limitations as a ground for summary judgment. Under the Equal Pay Act, a claim must be brought within two years of the date the cause of action accrued or, if the claimant can prove that the violation was willful, within three years. See 29 U.S.C. § 255(a). Plaintiffs do not dispute that this is the applicable statute of limitations, See Plaintiffs' Resp. at 17-18, and in any event, it is. Accordingly, each of the plaintiffs can only recover for violations of the Equal Pay Act occurring within the two-year period prior to her filing suit or within three years prior to her filing suit if she can show that the conduct was willful.

Having established the time boundaries of this claim, the Court turns to the merits. The Equal Pay Act prohibits employers from discriminating on the basis of sex by paying wages to employees of one sex that are less than the rate paid employees of the opposite sex for equal work on jobs that require equal skill, effort, and responsibility and are performed under similar working conditions. See 29 U.S.C 206(d) (1) Plaintiffs' Equal Pay Act claims are subject to a burden-shifting framework that is similar to that used in Title VII claims, The difference lies in who bears the burden of persuasion. In a Title VII case, the burden of persuasion always

remains with the plaintiff. Plemer, 713 F.2d at 1136. Under the Equal Pay Act, if the plaintiff meets her burden of establishing a prima-facie case, the burden of persuasion shifts to the defendant to show that the pay differential is based on (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) a differential based on any factor other than sex. See 29 U.S.C. §206(d) (1); Schulte v. Wilson Indus., Inc., 547 F- Supp 324, 338-39 (S.D. Tex. 1962)

As with Plaintiffs' timely, unequal-pay claims under Title VII, the Court likewise concludes that summary judgment is proper on plaintiffs' claims under the Equal Pay Act. Plaintiffs have failed to present evidence that the work they performed required equal skill, effort, and responsibility as the work performed by the complained-of male employees. Again, even had Plaintiffs established a prima-facie case, CMH Parks has met its burden of articulating legitimate, nondiscriminatory reasons for any pay disparities. Accordingly, the Court grants summary judgment on Plaintiffs' Equal Pay Act claims

IV. Conclusion

For the reasons stated above, Defendant Clayton Homes, Inc. and CMH Parks, Inc.'s Motion for Summary Judgment 35] is granted on all of Plaintiffs' claims except for Cowell's claim of retaliation under Title VII

SIGNED May 30 , 2002.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Fn1 Cowell does not identify what specific acts of discrimination constitute intentional infliction of emotional distress. The court presumes she is referring to unequal pay.

Fn2 As such, the Court is not minimizing Plaintiffs' claims for unequal pay, which are analyzed below. Rather, this conduct is simply not "extreme and outrageous" as required for a claim of intentional infliction of emotional distress.

Fn3 Notably, Parker cites to no summary-judgment evidence in support of any of these incidents. Although summary judgment would be proper on this basis alone, the Court has, out of abundance of caution, examined the conduct alleged by Parker, both here and with respect to Parker's claim for sexual harassment under Title VII. See Forsyth v Barr, 19 F.3d 1527, 1537 (5th Cir. 1994), cert. denied, 513 U.S. 871 (1994) (To satisfy chair burden, nonmovants are required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports their claim).

Fn4 If the harasser is a cc-worker, as opposed to a supervisor, a plaintiff must establish a fifth element- - that the employer knew or should have known of the harassment but failed to take prompt remedial action. Woods v. Delta Beverage Group, Inc., 274 F3d 299, 299 (5th Cir. 2001). Because Parker's allegations are lodged against a supervisor, the court finds that Parker is not required to establish the fifth element to make a prima facie case.

Fn5 See also Gearhart, 888 F. Supp. at 824-25 (supervisor's comments about a woman's breasts, putting his arm around plaintiff and touching the right side of her breast, playing with her hair, and kicking her

in the buttocks, not sexual harassment as a matter of law); Webster, 192 F. Supp.2d at 692 (supervisor's allegedly throwing objects at plaintiff, sticking his tongue out in a sexually suggestive manner, asking her if she wanted to get drunk, telling her that all women were "fair game," and pushing her and her chair into a desk to read her computer from behind, not sexual harassment as a matter of law).

Fn6 That Whitworth did not know prior to meeting Parker that she was black is not actionable. There's no allegation that he reacted in any negative way upon actually meeting her. To the contrary, she was hired. As far as not getting credit for one sale, the only summary-judgment evidence before the Court is that it was company policy to credit the person originating the sale, not the person completing it. (Defendants' Br. at 41.)

Fn 7 The Court's granting of summary judgment on Parker's claim for race discrimination includes say claim by Parker for race-based, hostile work environment. Parker fails to offer any response to CMH Parks's motion for summary judgment on this issue. She also fails to establish a prima-facie case for hostile work environment, see Padilla, 67 F. Supp.2d at 659 (setting forth elements of hostile work environment.)

Fn8 Stated differently, Plaintiffs have failed to convince the Court that the alleged failure of CMH Parks to concede liability to them on their unequal-pay claims constitutes an adverse employment action. If anything, assuming there were no immediate pay increases which Plaintiffs notably submit no evidence), the status quo was merely maintained pending resolution of the overarching dispute over whether the pay was in fact unequal.

Fn 9 To the extent there was any gap between filing charges with the EEOC and cessation of employment, it appears undisputed that Cowell left CMH Parks's the month following her EEOC charge and that Byrd and Parker both subsequently took extended medical leaves and did net return to work prior to resigning. (Defendants' App. at 74, 213, 441-42, 503-04, 607-08 .)

Fn 10 Although the task of citing to summary-judgment can no doubt be tedious and time-consuming, it has long been a fundamental requirement of summary-judgment practice.

Fn11 Notably, harassment intended to force someone to resign is not in and of itself an adverse employment action Haynes, 2000 WL 140744, at *12.

Fn12 Plaintiffs also assert a Title VII sex-discrimination claim on the basis of equal pay. This claim is analyzed below in conjunction with Plaintiffs' Equal Pay Act claim. Plaintiffs also make scattered allegations about miscellaneous other wrongful conduct by CMH Parks; for example, the "failure to provide support" to Cowell and "other disparate treatment." (Plaintiffs' Resp. at 10, 24-25.) To the extent Plaintiffs base their sex-discrimination claims on any conduct other than failure to promote or unequal pay, the Court concludes that summary judgment is proper. The allegations going to other conduct are conclusory and largely unsupported by citations to summary-judgment proof.

Fn13 Contrary to Plaintiffs' bald assertion that Defendant is "wrong," see Plaintiffs' Resp. at 17, Plaintiffs bear the burden of showing that the continuing-violation doctrine applies, see Celescine v. Petroleos De Venezuella SA, 266 F.3d 343,353 n.2 (5th Cir. 2001

Fn14 In effort to show a pattern of discrimination, Plaintiffs have created a chart, purportedly showing that men are promoted more quickly than women at CMH Parks. (Plaintiffs' Resp. at 14.) The pattern-and-practice method of proof is almost exclusively used in class actions and not in an individual discrimination suits as here See Celestine, 266 F.3d at 354-55. In individual suits, each plaintiff must establish her prima-facie case Plaintiffs have cited no authority to the contrary.

Fn15 To the contrary, even though not its burden of proof, CMH Parks points to evidence that at least Montgomery knew of a pay disparity while employed by CME Parks. (Defendants' Br. and citations therein at 25-25.) Plaintiffs do not counter or even address this evidence. Moreover, it appears from plaintiffs' Response that Byrd and Montgomery were aware of a pay disparity because they asked for a raise and had those requests denied. (Plaintiffs Reap, at 4, 8.)

Fn16 Some of the specific instances of unequal pay alleged by Plaintiffs are not clearly identified by date.

Supreme Court, U.S.
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No. 03-33

In The Supreme Court of the United States

GAYLA MONTGOMERY, KRONNA BYRD, JOANNE PARKER and KACCI MICHAELS,

Petitioners,

v.

CLAYTON HOMES, INC. and CMH PARKS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioner, other parties who should be identified are CMH Capital, Inc. Corp. and Clayton Homes, Inc. CMH Parks, Inc. Corp. is a wholly-owned subsidiary of CMH Capital, Inc. Corp., which is a wholly-owned subsidiary of Clayton Homes, Inc. As of July 30, 2003, Clayton Homes, Inc. became a wholly-owned subsidiary of Berkshire Hathaway, Inc., which is not a publicly traded company.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Clayton Homes, Inc. and CMH Parks, Inc. (collectively "Respondents"), respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Gayla Montgomery, Kronna Byrd, Joanne Parker and Kacci Michaels.

INTRODUCTION

Despite Petitioners' best efforts to transform this case into one which warrants this Court's attention, this case involves no novel legal issues, no unresolved issues of federal law which are determinative, and no issue which is important to federal jurisprudence. Therefore, the Court should deny the Petition for Writ of Certiorari.

In the courts below and before this Court, Petitioners have mischaracterized the evidence in the record and have made conclusory assertions which are not supported in the record. That occurrence lies at the very heart of the reason for denying the Petition. That is, although Petitioners attempt to package this case as one in which important legal principles are implicated, it is not. Rather, this is nothing more than a case in which Petitioners, when given the opportunity to identify specific facts and events to support their claims of discrimination and when facing the obligation to do so in response to a motion for summary judgment, wholly failed in that regard. In addition to failing to offer specific facts to support claims of discrimination, Petitioners failed to offer evidence of when events occurred. Consequently, the trial court was unable to even determine whether the claims fell within the applicable

statute of limitations. As a result of those failures, the trial court, in accordance with the universally recognized summary judgment standard and a standard which is unchallenged in this case, dismissed Petitioners' claims. The action and rationale of the trial court was affirmed on appeal.

Indeed, the lower courts did not dismiss Petitioners' claims and affirm dismissal, respectively, by applying any principle of law inconsistent with other circuits, nor did they reach those results by applying any novel theory of law or one which is important to federal jurisprudence. Instead their rulings were quite simply the result of Petitioners' failure to present evidence (versus unsubstantiated subjective opinions) in support of their claims. That failure notwithstanding, Petitioners steadfastly persist in making conclusory assertions of discrimination and are now trying to get this Court to provide them relief despite their own failings below. Accordingly, this case presents no legal issue which warrants consideration by this Court. For this and all the reasons set out below, Respondents respectfully urge the Court to deny the writ.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Courts Below

Petitioners generally state the course of the proceedings and disposition in the courts below; however, some additional information regarding the holdings below is necessary. In the district court, Petitioners asserted causes of action under the Equal Pay Act; claims under Title VII for unequal pay, sexual harassment, race discrimination,

sex discrimination and retaliation; and state law claims for intentional infliction of emotional distress. Respondents filed a Motion for Summary Judgment asserting numerous grounds for dismissal of all claims of each Petitioner. Among the grounds asserted were that Petitioners failed to state a *prima facie* case, or otherwise establish the requisite elements of their claims, and that Petitioners' claims were barred by the applicable statutes of limitations. The district court found Respondents' arguments meritorious and dismissed all of Petitioners' claims. The district court found, *inter alia*, that Petitioners failed to provide any evidence to support a *prima facie* showing of the requisite elements of their claims, and it also found that Petitioners failed to establish that they had timely asserted their claims under the applicable 300-day limitations period under Title VII and the two-year limitations period under the EPA.

Thereafter, on appeal, the Fifth Circuit affirmed the district court's order. The Fifth Circuit affirmed in three layers. First, the panel noted that the district court properly identified the applicable statutes of limitations and properly applied those statutes. The Court further explained that, because Petitioners failed to establish when events had occurred or that events had occurred within the applicable limitations periods, the district court had properly rejected those claims. Second, the panel noted that, even assuming some of Petitioners' claims were timely, the Petitioners had failed to establish any *prima facie* case of discrimination. Third, the panel explained that, even if Petitioners had established any *prima facie* case of discrimination, Respondents had offered legitimate, non-discriminatory reasons for any pay disparities, and those reasons were not controverted by Petitioners.

II. Statement of Facts

The purpose of this portion of the Response is to establish Respondents' disagreement with many assertions made by Petitioners and to preserve Respondents' right to address those factual record disputes in the event this Petition is granted. It was noted by the district court in its order that Petitioners made statements which are not properly supported by the summary judgment evidence. The district court stated, "As with many of the assertions in Plaintiff's [sic] Response, this allegation is, for the most part, conclusory and unsupported by any cites to summary judgment proof." (Petition Appendix at 20a; see also Petition Appendix at 12a). The Fifth Circuit also noted that Petitioners had made conclusory assertions without record support. (Petition Appendix at 7a). Petitioners have made these same conclusory, unsupported assertions in their Petition to this Court.

Particularly, Petitioners continue to argue that they provided evidence to support their unequal pay claims under the EPA. Petitioners contend they presented evidence of "men doing the same job being paid more." (Petition at 9). What this contention wholly ignores is that the summary judgment record is devoid of evidence that Petitioners were paid less for performing the same jobs. The district court correctly provided, "Plaintiffs have failed to present evidence that the work they performed required equal skill, effort, and responsibility as the work performed by the complained of male employees." (Petition Appendix at 28a). Additionally, the Fifth Circuit panel stated, "After reviewing the record, we are persuaded that the unequal pay was the result of differences in job responsibilities, experience, and work performance." (Petition

Appendix at 4a). Likewise, in footnote 4, the panel opinion states:

> The Plaintiffs did not put forth evidence showing that the positions entailed equal work, skills and responsibilities. Their conclusory assertions that the responsibilities were identical to those of the men in question does not change this result.

(Petition Appendix at 7a). Accordingly, to the extent Petitioners' Petition asserts these issues as factually established, such assertion is not accurate. Instead, all Petitioners have done is repeat unsubstantiated assertions of a factual dispute.

In addition to making conclusory assertions not contained in the record, Petitioners inaccurately characterize evidence that is in the record. The factual inaccuracies advanced by Petitioners are significant in number and degree. Without revisiting and repeating the entire summary judgment record, Respondent does offer the following examples to illustrate the nature of the inaccurate statements made by Respondents.

First, in support of their claim that they established unequal pay between men and women, Petitioners point to David Cahill as an individual who was paid more than one of the Petitioners (Michaels) for the same work. (Petition at 10). A critical fact that Petitioners fail to point out or acknowledge is that, although Cahill assumed the job responsibilities of Petitioner Michaels as property manager during a leave of absence she took and after she left the company, Cahill was not just a property manager. Instead, he was a Special Projects Manager who, in the absence of the property manager, performed property management duties in addition to the duties of the Special

Projects Manager. Thus, quite simply, he was not a proper comparator for purposes of Petitioners' equal pay claims. The record is replete with instances like this of Petitioners attempting to compare themselves to individuals who held different jobs, had different responsibilities and different skills and experience.

A second example also relates to Petitioners' equal pay claims. Petitioners contend that they refuted any nondiscriminatory reason proffered by Respondents for pay to women that was different than pay to men by showing that Respondent generally discriminated. As evidence of this alleged systemic discrimination, Petitioners offered averages, calculated by them, which purported to show that it took women much longer to become community managers than it took men. (See Petition at 12). In advancing these averages and as pointed out in the proceedings in the lower courts, Petitioners present the information in a misleading manner. For instance, among the women included in their average is a woman who, when she first came to work for Respondent, was a housekeeper and did not have a high school diploma. It is no surprise that it took her quite a while to work her way up to the position of manager, versus the length of time it took a male employee who, when he came to work for Respondent, had a college degree and many years of experience as a manager. Petitioners' averages take no account of these types of substantial differences in qualifications and background.

In addition to these averages being misleading, the numbers used to calculate the averages are absolutely wrong in many instances. For example, in calculating their average, Petitioners, without any citation to the record, indicated that it took Sharren Giles 39 months to

become a community manager. Using deposition testimony from Sharren Giles and employment records, Respondents established that when Giles was hired, she was hired as a community manager. Thus, where Petitioners use a figure of 39 months to arrive at their average, they should have used 0. The summary judgment evidence record clearly showed that Giles was not the only woman for whom Petitioners used erroneous, inflated numbers. Again, it was errors and omissions of this sort which soundly supported the conclusion of the district court that Petitioners failed to offer summary judgment evidence to support their discrimination claims.

REASONS FOR DENYING THE WRIT

I. Opinion below is unpublished and not precedential

Initially, the Court should note that the panel opinion in this case is unpublished and not precedential. As evidenced by the Fifth Circuit's decision not to publish this decision, the decision by the Fifth Circuit is not an important legal decision in federal jurisprudence. In particular, the Fifth Circuit's analysis primarily involves the application of the particular summary judgment evidence to the established standard for a plaintiff's *prima facie* case under Title VII and the Equal Pay Act. The opinion below makes no new legal determinations or standards and, thus, is not worthy of review by this Court.

II. There is no conflict among the circuits on any legal issue presented in this case

The Fifth Circuit adheres to the rule that, in order for a claimant to present a *prima facie* case of retaliation under Title VII, she must prove that she suffered an ultimate employment action. Petitioners contend that, even if they were not subjected to an ultimate employment action, the conduct they were subjected to was so egregious, that the Fifth Circuit rule should be changed to permit a retaliation claim to proceed even in the absence of an ultimate employment action. (Petition at 15). One argument advanced by Petitioners to support their position on this point is that the Fifth Circuit is out of step with most other circuits which, according to Petitioners, do not require an ultimate employment action before a claimant can maintain a retaliation claim. Using this argument, Petitioners attempt to transform this case into one which presents a conflict among the circuits, and Petitioners contend this Court should take this case to resolve this conflict. In fact, no such legal issue is presented in this case because this case does not implicate a rule of law about which there is conflict among the circuits.

First, Petitioners overstate the alleged conflict among the circuits on this issue. To the extent other circuits are in disagreement over the "ultimate employment decision" issue, the definitions and tests provided are sufficiently similar such that, for purposes of this case, there is no appreciable difference in the tests employed by the Fifth Circuit and other circuit courts.

For instance, in the First Circuit, in order to maintain a retaliation claim, a claimant must demonstrate a "material

change" in the conditions of employment, as opposed to an "ultimate employment action." A material change has been identified as including things such as "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees." *Gu v. Boston Police Dep't*, 312 F.3d 6, 14 (1st Cir. 2002). Similarly, in the Second Circuit, a material adverse change in the terms and conditions of employment is required for a retaliation claim. *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 791 (2d Cir. 1997). The Third Circuit has stated that an adverse employment action for purposes of establishing a retaliation claim is one which is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Cardenas v. Massey*, 269 F.3d 251, 263 (3d Cir. 2001). Under the test as applied in the Third Circuit, harassment, intense scrutiny and overly-critical supervision have been determined to be actions which are insufficient to support a retaliation claim. *Buffa v. N.J. State Dep't of Judiciary*, 56 Fed. Appx. 571 (2003). In sum, under the facts of the present case, applying the standards employed by the Courts of Appeals in other circuits would lead to the very same result reached here.

Additionally and alternatively, even assuming there is some significant difference in the standards applied by the different circuits regarding the type of employment action necessary to support a retaliation claim, that distinction would not be determinative here or lead to a different result. It would not be determinative here because all of the circuits require a causal connection between the reporting of the violation and the adverse employment action, and that causal connection is not satisfied here.

Petitioners brought their claim complaining, in part, about alleged disparities in pay between them and men. Petitioners contend, again without any support in the record, that Respondents acknowledged the differences in pay but told Petitioners that the disparities would be corrected only if Petitioners dropped their claims. Petitioners contend this refusal constituted retaliation. Even assuming what Petitioners allege is true, which Respondents hotly dispute, that decision was not retaliatory. Rather, Respondents were merely choosing to, during the pendency of the lawsuit, refrain from changing previously made employment decisions, which were the subject of the lawsuit. That is neither retaliation nor adverse employment action. As noted by the Fifth Circuit, if it were, every unequal pay claim would be transformed into a retaliation claim by an employer's predictable refusal to grant the disputed pay raise during the pendency of the suit. (Petition Appendix at 5a). That is an absurd result which is not contemplated by the retaliation law, and that occurrence does not create the requisite causal connection. That is so no matter which circuit's test or definition of employment action is applied. In short, under any test employed by any circuit, the Petitioners' retaliation claims fail. Accordingly, Petitioners' argument in this regard is without merit.

A third reason this is not a case requiring resolution of a conflict among circuits is that, in reaching its decision, the Fifth Circuit did not even rely upon the allegedly conflicting language. That is, nowhere in the panel decision does the phrase "ultimate employment decision" even appear and nowhere does the panel discuss this issue or the other circuits' holdings in this regard. Therefore, it was not a dispositive issue.

Moreover, despite Petitioners' bald assertion that the alleged retaliation in this case was "severe," both the district court and the Fifth Circuit rejected this characterization by Petitioners. Far from being "severe," the alleged conduct in the case was simply not actionable under any cause of action. As the district court found with regard to the allegation by Petitioners that the conduct of Respondents was "extreme" and "outrageous":

> CMH Parks contends, inter alia, that no conduct toward any of the plaintiffs rises to the requisite extreme and outrageous level necessary to sustain this cause of action. The Court agrees. In response to CMH Park's summary judgment, Plaintiffs allege scant instances of any specific conduct. What conduct is alleged is done so in conclusory fashion with few, if any, record citations to summary judgment evidence. Conclusory allegations are not summary judgment evidence.

(Petition Appendix at 12a). Therefore, the summary judgment evidence in this case does not show such "extreme" and "outrageous" conduct by Respondents to justify any exception under federal law.

Accordingly, to the extent the Fifth Circuit may be in conflict with other circuits on the issue of whether an "ultimate employment decision" is required, such conflict is not present in this case. Therefore, that issue does not present a basis for review and cannot be relied upon to contend that this case is of such importance that it warrants a review and decision on the merits by this Court.

III. No fact question exists on the summary judgment record in this case

Petitioners also assert that this Court should take this case because the summary judgment evidence shows that a fact question exists as to whether men were paid more for doing the same job as women. Because, according to Petitioners, this was established in the record, the grant of summary judgment caused them to be unfairly "stripped of being able to submit their case to the jury." (Petition at 9). What this argument completely ignores is, as discussed above, that the summary judgment evidence fails to show that the men cited by Petitioners had the same jobs or were similarly situated to Petitioners. Thus, Petitioners failed to establish their *prima facie* case. The district court provided, "Plaintiffs have failed to present evidence that the work they performed required equal skill, effort, and responsibility as the work performed by the complained of male employees." (Petition Appendix at 28a). Additionally, the Fifth Circuit panel stated, "After reviewing the record, we are persuaded that the unequal pay was the result of differences in job responsibilities, experience, and work performance." (Petition Appendix at 4a). These findings by the courts below accurately reflect the state of the summary judgment record. Accordingly, the summary judgment evidence simply does not support the Petitioners' argument and does not present any significant or important federal issue for the Court's consideration.

In summary, the unpublished opinion from the Fifth Circuit panel does not warrant review by this Court because this case involves nothing more than Petitioners' failure to meet its *prima facie* case based on the specific summary judgment record below. At this stage, Petitioners are merely rehashing the same conclusory and unsupported

contentions that have already been rejected by the district court and the Fifth Circuit.

IV. The Fifth Circuit's judgment and analysis is correct on the merits

In addition to the reasons stated above for the Court to deny the writ sought in this case, this Court should deny the writ because the Fifth Circuit panel correctly decided the issues on the merits. Therefore, even if this Court believed the issues were such as to warrant review by this Court, the only result would be to affirm the judgment.

A. Petitioners' claims are barred by limitations

First, the Petitioners' claims are barred under the applicable limitations periods. To establish an unequal pay claim under Title VII, a claimant must file a charge with the EEOC within 300 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). While an exception applies for continuing violations, this exception is not applicable in Title VII cases based on discriminatory pay because a decision denying a pay raise is a discrete act with a degree of permanence sufficient to put an employee on notice of the adverse action and to trigger in an employee an awareness of the duty to assert his rights. *Celestine v. Petroleos de Venezuella S.A.*, 266 F.3d 343, 352 (5th Cir. 2001). With regard to an Equal Pay Act claim, the limitations period is two years preceding the date suit is filed. That period may be extended to three years if the claimant can prove the violation was willful. 29 U.S.C. § 255(a). Petitioners have not challenged these limitations

periods as applied by the courts below. Based on these established periods, the courts below properly determined that the Petitioners "failed to put forth any evidence of when they learned of the pay disparity." (Petition Appendix at 3a-4a). Indeed, Petitioners do not even challenge such finding and cannot point to any summary judgment evidence to support a timely filing. Accordingly, because there is no evidence to support a showing that Petitioners learned of the pay disparity within the limitations periods, the judgment below is correct and requires no review by this Court.

B. Petitioners failed to establish their *prima facie* case

Second, as discussed above, even if Petitioners can point to some summary judgment evidence showing that they learned of the pay disparity within the limitations period, Petitioners failed to establish their *prima facie* case. To establish a *prima facie* case of compensation discrimination under Title VII, a plaintiff must show that she is a member of a protected class, and is paid less than a nonmember for work requiring substantially the same responsibility. *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1431 (5th Cir. 1984). A *prima facie* Equal Pay Act claim requires a showing that the "employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which require equal skill, effort and responsibility, and which are performed under similar working conditions.'" 29 U.S.C. § 206(d)(1); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L.Ed.2d 1 (1974); *Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 546 (5th Cir. 2001).

As both the district court and the Fifth Circuit found, while Petitioners list a number of male employees who were purportedly paid more, Petitioners failed to present evidence that the work they performed required equal skill, effort, and responsibility as the work performed by the men. In fact, in many instances, the record made clear that the men in question were not proper comparators because they held different positions, worked at different locations, worked during different time periods, and/or worked under different managers. Furthermore, Petitioners offered no evidence that the job content and actual job requirements were the same or that they had similar experience or training as the men they were citing. *Cf. EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1196 (5th Cir. 1984); *see also Ceasar v. Lamar Univ.*, 147 F. Supp. 2d 547, 553 (E.D. Tex. 2001) (employees with different levels of experience are not "similarly situated" for purposes of Title VII salary comparison); *Lenihan v. Boeing*, 994 F. Supp. 776, 798 (S.D. Tex. 1998) (an individual's experience and training are factors upon which an employer may properly rely in justifying a pay differential). To the contrary, all that Petitioners offered were unsupported, subjective and conclusory statements that they were performing work commensurate to that of the male employees. This is simply not sufficient under federal law to defeat summary judgment, and the holdings of the lower courts recognized this. Accordingly, the decision of the Fifth Circuit is correct.

C. Respondents established legitimate, non-discriminatory reasons

Even if Petitioners had established their *prima facie* case, Respondents established legitimate, non-discriminatory

reasons for the pay differentials. The summary judgment evidence established that there were very substantial differences in the responsibilities, duties and experience of the male comparators. Without addressing the details of the summary judgment evidence, at this stage of this case, it is sufficient to note that both the district court and the Fifth Circuit panel reviewed the evidence and confirmed that it established legitimate, non-discriminatory reasons for the pay differentials. As the Fifth Circuit stated, "After reviewing the record, we are persuaded that the unequal pay was the result of differences in job responsibilities, experience, and work performance." (Petition Appendix at 4a). Accordingly, Respondents established legitimate, non-discriminatory reasons for the pay disparity.

D. Petitioners failed to show pretext

Moreover, the last layer of support for the summary judgment is that Petitioners failed to put forth any evidence that the reasons articulated by Respondents are pretextual. For the same reasons articulated above regarding Petitioners' failure to establish their *prima facie* case, Petitioners likewise failed to put forth any persuasive evidence that the reasons articulated by Respondents were pretexts for intentional discrimination. (Petition Appendix at 4a).

CONCLUSION

Petitioners have failed to provide any compelling reason for this Court to grant a Writ of Certiorari. The Fifth Circuit, in an unpublished opinion, did not decide any significant or unresolved issue of federal law. Moreover, the

decision below does not conflict with another circuit. Additionally, the district court and Fifth Circuit were correct in their decisions. This case does not merit further review by this Court.

For all the foregoing reasons, Respondents request that the Petition be denied.

Respectfully submitted,

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